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IN THE

Supreme Court of the United States

October Term, 1965.

No. 981.

LEON KIRSCHNER and HENRY NAFTULIN, Individually and as Co-Partners, Trading as K-N Enterprises,
Petitioners,

v.

WEST COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

THEODORE VOORHEES,
GEORGE REATH, JR.,
1600 Three Penn Center Plaza,
Philadelphia, Pa. 19102
Attorneys for Respondent.

DECHERT, PRICE & RHOADS,
1600 Three Penn Center Plaza,
Philadelphia, Pa. 19102
Of Counsel.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-5711 Area Code 215

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LEON KIRSCHNER AND HENRY NAFTULIN, INDIVIDUALLY AND AS CO-PARTNERS, TRADING AS K-N ENTERPRISES,
Petitioners,

v.

WEST COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Respondent, West Company, prays that the Petition for a Writ of Certiorari of Leon Kirschner and Henry Naftulin be dismissed.

OPINIONS BELOW.

The *per curiam* decision of the Court of Appeals is reported at 353 F. 2d 537 (3d Cir. 1965). The opinion of the District Court is reported at 247 F. Supp. 550 (D. C. E. D. Pa. 1965).

ARGUMENT.

The primary question raised by petitioners is whether the United States Arbitration Act [1] may be constitutionally applied as substantive federal law in a case in which the jurisdiction of the federal court rests upon diversity of citizenship. Petitioners characterize this as an important constitutional question "mentioned, but unresolved, in *Bernhardt v. Polygraphic Co.,*" 350 U. S. 198 (1956) (Petition, page 7).[2]

Petitioners suggest that there are conflicting views in the Courts of Appeal. Inferentially, at least, counsel acknowledges that the opinion of Judge Medina in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.,* 271 F. 2d 402 (2d Cir. 1959), *cert. granted* 362 U. S. 909 (1960), *cert. dismissed* 364 U. S. 801 (1960), squarely rules this case against them, which was evidently the view of the District Court, *Kirschner v. West Company,* 247 F. Supp. 550 (D. C. E. D. Pa. 1965), and also that of the Court of Appeals, which affirmed, per curiam, on the opinion of Judge Luongo, 353 F. 2d 537 (3d Cir. 1965). The allegation of a conflict in the Courts of Appeal is not expanded in the Petition. Counsel goes no further than to cite *American Airlines, Inc. v. Louisville and Jefferson County Air Board,* 269 F. 2d 811 (6th Cir. 1959), and *Ross v. Twentieth Century-Fox Film Corp.,* 236 F. 2d 632 (9th Cir. 1956) (Petition, page 7), both decided prior to *Robert Lawrence.* Those cases reached the same conclusion as the Second Circuit in ruling that the federal Arbitration Act is to be applied in a diversity case wherein the arbitration agreement is found in a contract involving a transaction in interstate commerce.

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1. 9 U. S. C. § 1 *et seq.*

2. *Bernhardt* differs from the case at bar in that no maritime transaction or contract evidencing "a transaction involving commerce" was there presented, as noted by the Court at page 200.

The three cases differ only to this extent: *Robert Lawrence* followed federal and not state law in ruling that the arbitrator rather than the court should be the one to determine whether the agreement to arbitrate had been vitiated by fraud. In *American Airlines* and *Ross*, the Sixth and Ninth Circuits ruled that the validity of the underlying contract depended upon state law even though the enforceability of the agreement to arbitrate was to be determined under the federal Arbitration Act.[3]

In the case at bar, there has never been any challenge of the validity of the contract between the parties on the ground of fraud or for any other reason. Petitioners have based their suit upon the contract.

There have in fact been a number of diversity cases involving transactions in admiralty or interstate commerce, in which the Courts of Appeal have passed upon the applicability of the federal Act. They have consistently applied the provisions of that Act and have enforced an agreement to arbitrate without regard to the public policy of a state the law of which would otherwise be applicable. In addition to the three cases cited in the previous paragraph, attention is called to *Monte v. Southern Delaware County Authority*, 321 F. 2d 870, 874 (3d Cir. 1963); *Kentucky River Mills v. Jackson*, 206 F. 2d 111 (6th Cir. 1953), *cert. den.* 346 U. S. 887 (1953); *Amicizia Societa Navigazione v. Chilean Nitrate and Iodine Sales Corp.*, 274 F. 2d 805 (2d Cir. 1960), *cert. den.* 363 U. S. 843 (1960); *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F. 2d 382 (2d Cir. 1961), *cert. den.* 368 U. S. 817 (1961);

3. Petitioners have gone no further than to suggest that the arbitration covenant might not be enforceable under *Illinois* law and to state that the contract was made in Illinois. Wholly overlooked is the fact that in the first instance at least the federal court would look to the law of the forum, Pennsylvania, if it should be determined that the federal Act does not apply. Pennsylvania has a strong public policy favoring the enforcement of arbitration covenants. See 5 Purdon's Pa. Stats. Ann. § 161 (1927); *Conneaut Lake Agricultural Association v. Pittsburg Surety Co.*, 225 Pa. 592, 596, 74 Atl. 952, 953 (1909).

In Re Kinoshita & Co. Ltd., 287 F. 2d 951 (2d Cir. 1961). See also *Standard Magnesium Corp. v. Fuchs,* 251 F. 2d 455 (10th Cir. 1957).

In the last analysis, therefore, petitioners are relying on the fact that this Court granted certiorari in *Robert Lawrence* and then was deprived of the opportunity to review the decision of the Second Circuit when, in 1960, the case was settled and the certiorari was dismissed. Circumstances have changed in many respects, however, during the last six years.

In the first place the federal policy to promote the integrity of arbitration agreements has gained enormous impetus in the afterglow of the Steelworkers' trilogy (*United Steelworkers of America v. American Manufacturing Co.,* 363 U. S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U. S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U. S. 593 (1960)). See also *Metro Industrial Painting Corp. v. Terminal Construction Co.,* 287 F. 2d 382 (2d Cir. 1961), *cert. den.* 368 U. S. 817 (1961).

Secondly, the policy of the states themselves with respect to the enforcement of agreements to arbitrate is changing, and that reflected in the federal Arbitration Act is gaining broad acceptance in states that formerly followed the common law policy of "preserving the jurisdiction of the courts" and refusing to enforce agreements to arbitrate future disputes. This change of policy is illustrated in the amendment of the Arbitration Law of Illinois (Act of June 11, 1917, Laws 1917 p. 202, Smith-Hurd, Ill. Ann. Sts., ch. 10 § 1 as amended by the Act of August 24, 1961, Laws 1961, p. 3844 § 1), which has, in effect, changed the public policy of that state and rendered obsolete the common law decisions on which petitioners have relied during the years in which this case has been litigated.

Thirdly, during the six years that have elapsed since the certiorari was dismissed in *Robert Lawrence,* that decision has been cited in federal court decisions on more than

thirty-five occasions, and the basic ruling on which Respondent now relies has not been successfully challenged and has seldom even been questioned.

Petitioners next suggest (Petition, page 9) that there is "a threshold question in this case" as to whether the agreement between the parties is a contract "evidencing a transaction involving interstate commerce".

The complaint contained allegations that plaintiffs had invented a certain coating composition of rubber closures and that "plaintiffs and defendant entered into a certain agreement, in writing, wherein and whereby plaintiffs granted to defendant the sole and exclusive right and license to make, use and apply the said coating composition in connection with rubber or synthetic closures used by the pharmaceutical industry" (R. 4a). At the time the motion for a stay was first before the District Court, Judge Goodrich, sitting specially, took judicial notice of the fact that the pharmaceutical industry covered the entire United States and hence he ruled that the contract evidenced a transaction involving "commerce." *Kirschner v. West Company,* 185 F. Supp. 317, 319 (D. C. E. D. Pa. 1960). In granting the defendants' motion for stay, he dismissed the contention which is now being argued by petitioners that the painting of a rubber stopper did not involve interstate commerce, with the comment: "The citation of cases involving a concept of 'commerce' prevalent in the days of *Hammer v. Dagenhart,* 247 U. S. 251 (1918), does not help us on this problem at the present time" (185 F. Supp. at p. 319). Petitioners' citations of *Cold Metal Process Co.,* 9 F. Supp. 992 (D. C. W. D. Pa. 1935); *Metro Industrial Painting Corp. v. Terminal Construction Co.,* 287 F. 2d 382 (2d Cir. 1961), *cert. den.* 368 U. S. 817 (1961); and *John W. Johnson, Inc. v. 2500 Wisconsin Ave.,* 231 F. 2d 761 (D. C. Cir. 1956), are equally unpersuasive. The language in the contract in suit clearly showed that the transaction

involved "commerce," and plaintiffs have never offered to supply any evidence which might tend to establish the contrary. This point is wholly without merit. See *United States v. Darby,* 312 U. S. 100, 117-118 (1941), and the long line of cases following it.

The suggestion that there was no issue to arbitrate (Petition, page 10) seems to be predicated on the idea that the mere assertion of the plaintiffs' cause of action in their complaint established their right of recovery beyond the possibility of a successful defense, an extreme position that plaintiffs have urged throughout the proceeding. If such a position ever had validity, it was lost when they voluntarily agreed to arbitrate this controversy and participated in the arbitration proceeding. The arbitrator, former Chief Justice Stern of the Supreme Court of Pennsylvania, stated in the Award:

> "By agreement of the parties the matter has been referred to the undersigned as Arbitrator to decide the issues involved. By their further agreement the Arbitrator is first to decide the question of defendant's liability under the contract, and, if that issue be decided in favor of the plaintiffs, the amount due by defendant is to be determined by the Arbitrator in subsequent proceedings." (R. 32a)

Nothing contained in the Petition for a Writ of Certiorari furnishes this Court any basis for a finding that Judge Luongo and the Court of Appeals erred in dismissing this criticism of the arbitrator's award. The assertion that there was no issue to arbitrate was clearly frivolous.

The final ground set forth by the petitioners (Petition, page 11) involves the contention that the federal Arbitration Act covers only the rights arising out of the contractual

relationship of the parties and that in the second count of their complaint they had alleged a violation of the trust relationship of the parties "unaffected by contractual or other consideration." This issue was not raised until after the award.

In effect petitioners are trying to have two opportunities to litigate the same issue. First, they took their chances with the arbitrator to whom they submitted their entire claim without reserving their right to have the "trust relationship" theory later adjudicated by a court. The arbitrator having heard every aspect of their cause of action and having rejected it in toto, they now seek another opportunity to have their claim litigated de novo. Arbitration would soon lose its usefulness if the finality of an award could be disposed of in such a cavalier fashion.

CONCLUSION.

Petitioners have shown no substantial conflicts between the Circuits which require resolution in this Court. Since no basis is presented for the grant of a Writ of Certiorari, the Petition should be dismissed.

Respectfully submitted,

THEODORE VOORHEES,
GEORGE REATH, JR.,
1600 Three Penn Center Plaza,
Philadelphia, Pa. 19102,
Attorneys for Respondent.

DECHERT, PRICE & RHOADS,
1600 Three Penn Center Plaza,
Philadelphia, Pa. 19102,
Of Counsel.